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No. 90-1540

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ARNOLD WEISS, ESQUIRE,

Petitioner,

—vs.—

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, New York branch thereof; John T. Kean, Individually and as an Officer and Manager thereof; MARINE MIDLAND BANK, N.A. (formerly Marine Midland Bank-Western),

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Can a Federal judge ever rule on a petition to recuse himself?

(2) Can a Federal judge sanction an attorney for a recusal petition, if it has no chance of success and is filed to delay and to harass?

(3) Should a record on appeal be expanded to include material upon which a District Court judge did not rely or review, and which was offered to the District Court after its decision had been issued?

(4) Can a lawyer seek disqualification of a judge who is alleged to be biased against the lawyer, where there is no possibility of bias toward a party and where the bias alleged results from an adverse ruling in an unrelated case?

STATEMENT BY CORPORATE RESPONDENT

The Respondent, Federal Reserve Bank of New York, is a corporation chartered under the laws of the United States pursuant to the Federal Reserve Act. 12 U.S.C. § 226 *et seq.* Respondent has no parent company nor does it have any partially-owned subsidiaries or affiliates. Although stock of the respondent is owned by member commercial banks within the Second Federal Reserve District, none of the shareholders control the respondent. This statement is made pursuant to Supreme Court Rule 29.1.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Statement by Corporate Respondent	ii
Table of Authorities	iv
Jurisdictional Statement	vi
Statement of the Case	1
Reasons Why the Petition Should be Denied	2
I. Can a Federal judge ever rule on a petition to recuse himself?	2
II. Can a Federal judge sanction an attorney for a recusal petition, if it has no chance of success and is filed to delay and to harass?	2
III. Should a record on appeal be expanded to include material upon which a District Court judge did not rely or review, and which was offered to the District Court after its decision had been issued?	3
IV. Can a lawyer seek disqualification of a judge who is alleged to be biased against the lawyer, where there is no possibility of bias toward a party and where the bias alleged results from an adverse ruling in an unrelated case?	5
Conclusion	6
Appendix	1a

TABLE OF AUTHORITIES

Cases: PAGE

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., ____ U.S. ____, 111 S.Ct. 922 (1991) 3

Cooter & Gell v. Hartmarx Corp., ____ U.S. ____, 110 S.Ct. 2447, 2459 (1990) 3

Graver v. Linde, 336 U.S. 271 (1949) 5

Greater Buffalo Press, Inc. v. Federal Reserve Bank of New York, 866 F.2d 38 (2d Cir.), *cert. denied*, 490 U.S. 1107 (1989) vi

Greater Buffalo Press, Inc. v. Federal Reserve Bank of New York, 129 F.R.D. 462 (W.D.N.Y. 1990), *aff'd* mem., No. 90-7336 (2d Cir. Oct. 26, 1990) (*per curiam*) (not to be cited) .....*passim*

Henderson v. Department of Public Safety and Corrections, 901 F.2d 1288 (5th Cir. 1990) 3

In Re International Business Machines Corp., 618 F.2d 923 (2d Cir. 1980)..... 2

Katz v. Looney, 733 F. Supp. 1284 (W.D. Ark. 1990) 3

Perry v. Barnard, 911 F.2d 736 (7th Cir. 1990) (case printed in full 1990 U.S. App. LEXIS 14304, subject to Seventh Circuit Rule 53 on noncitation) 3

Pollitt v. General Motors, Inc., 894 F.2d 858 (6th Cir. 1990)..... 3

Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966)..... 2

In re Shuma, No. 83-0889-BM (Bankr. W.D. Pa. Mar. 14, 1991), 1991 Bankr. LEXIS 307..... 3

PAGE

Smith v. Our Lady of the Lake Hospital, No. 87-532-B, (M.D. La. Jan. 22, 1991), 1991 U.S. Dist. LEXIS 2626 3

Texas v. Mead, 465 U.S. 1041 (1984) 5

Statutes, Rules and Regulations:

12 U.S.C. § 226 *et seq.* ii

12 U.S.C. § 632 vi

28 U.S.C. § 455 2

28 U.S.C. § 455(a) 1

28 U.S.C. § 1331 vi

S. Ct. R. 14.1(i) vi

S. Ct. R. 29.1 ii

Fed. R. Civ. P. 11 ..... 1, 2, 3, 5

Fed. R. Civ. P. 37 1

JURISDICTIONAL STATEMENT

Petitioner did not comply with S. Ct. R. 14.1(i), necessitating a jurisdictional statement by respondent. In the court of first instance, Federal subject matter jurisdiction of the action on the merits, an action that was decided in favor of the New York Fed, was based on 12 U.S.C. § 632 and 28 U.S.C. § 1331. *Greater Buffalo Press, Inc. v. Federal Reserve Bank of New York*, 866 F.2d 38 (2d Cir.), *cert. denied*, 490 U.S. 1107 (1989). The petition concerns collateral orders issued by the district court after the judgment in the underlying action became final.

STATEMENT OF THE CASE

This is a case about bad lawyering, and about a lawyer who, before moving for recusal of the district court judge, failed to make a reasonable inquiry into the law governing recusal and who used recusal motions for improper purposes. After making four baseless recusal motions, the lawyer was sanctioned by the district court. The court of appeals affirmed the sanction after determining that the district court did not abuse its discretion.

The court of appeals found that: (1) the conduct of Judge Curtin was not properly in issue because 28 U.S.C. § 455(a) requires recusal only where there is a possibility of bias toward a party, and not where there is a possibility of bias toward a lawyer; (2) there was no evidence of any judicial bias whatsoever toward the plaintiff, Greater Buffalo Press, at any time during the decade-spanning history of the case on the merits; and (3) the district court did not abuse its discretion in sanctioning "a frivolous and repetitive recusal motion." Pet. App. at 6a-7a.

Petitioner has apparently abandoned two contentions that he pursued in the court of appeals: (1) that a Fed. R. Civ. P. 37 sanction assessed against him by the district court represented an abuse of discretion (Pet. App. 7a), and (2) that the New York Fed's counsel should have been disqualified (Pet. App. 8a). His arguments now are confined to the Fed. R. Civ. P. 11 sanction that was assessed against him, but it is important to recognize that petitioner has also been sanctioned for conduct unrelated to recusal. Although the petitioner's conduct that earned him the Rule 37 sanction and his frivolous attempt at attorney disqualification provide an important background for the Rule 11 sanction, we will limit our discussion to the issues raised in the petition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Can a Federal judge ever rule on a petition to recuse himself?

Stripped of petitioner's verbiage, the actual question propounded by petitioner sounds foolish. But this is his question. Petitioner would have it that, once the words "judicial misconduct and personal bias" are murmured by an attorney, intercession by another district judge is automatically required. Petitioner suggests a procedure that would become a splendid tool for judge-baiting, and for delay. But of equal importance, the suggested procedure is contrary to statute and without a Constitutional basis.

Petitioner's suggested procedure is inconsistent with 28 U.S.C. § 455, which speaks in terms of judicial *self*-recusal. Therefore, petitioner seems to want that statute declared unconstitutional. Perhaps that is petitioner's Due Process argument. But plenty of Due Process was afforded in this case, and it is nobody else's fault that petitioner did not seek a writ of mandamus—the conventional remedy for such situations.[1] His failure to seek this writ is perfectly consistent with judge-baiting; it is only inconsistent with a genuine grievance.

II. Can a Federal judge sanction an attorney for a recusal petition, if it has no chance of success and is filed to delay and to harass?

There is no magic in applying Rule 11 standards to a motion for recusal,[2] especially when the Rule's simple stan-

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1 "[T]here are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself.' *Rosen v. Sugarman*, 357 F.2d 794, 797 (1966)." *In Re International Business Machines Corp.*, 618 F.2d 923, 926 (2d Cir. 1980).

2 To our knowledge, no court that has considered Rule 11 sanctions for frivolous recusal motions has seen anything unusual about the

dards are applied to a motion made for the fourth time! The Rule, of course, requires that the signer conduct a reasonable inquiry into the facts and the law, and be satisfied that the document is well grounded in both, and be acting without any improper motive.[3] In this case, when he made his fourth try for recusal, petitioner had already been told by Judge Curtin why recusal was not appropriate. Under these circumstances, how could petitioner *not* be sanctioned under Rule 11? How could the appellate court not defer to the district court's judgment?[4]

Not one of the 12 active judges in the court of appeals felt there was any reason to question either Judge Curtin's factual finding or his exercise of discretion. The fourth recusal motion richly deserved the sanction that it received.

III. Should a record on appeal be expanded to include a record upon which a District Court judge did not rely or review, and which was offered to the District Court after its decision had been issued?

Petitioner suggests to this Court that he was denied the ability to make a record of the grounds that he asserted for the recusal of Judge Curtin. Petitioner has distorted what actually happened in the courts below. Respondent objects now, as he has objected below, to petitioner's attempt to

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practice. *See Henderson v. Department of Public Safety and Corrections*, 901 F.2d 1288 (5th Cir. 1990); *Pollitt v. General Motors, Inc.*, 894 F.2d 858, 860 (6th Cir. 1990); *Perry v. Barnard*, 911 F.2d 736 (7th Cir. 1990) (case printed in full 1990 U.S. App. LEXIS 14304, subject to Seventh Circuit Rule 53 on noncitation); *Smith v. Our Lady of the Lake Hospital*, No. 87-532-B, (M.D. La. Jan. 22, 1991), 1991 U.S. Dist. LEXIS 2626 *55-*56; *Katz v. Looney*, 733 F. Supp. 1284 (W.D. Ark. 1990), *In re Shuma*, No. 83-0889-BM (Bankr W.D. Pa. Mar. 14, 1991), 1991 Bankr. LEXIS 307 *19-*20.

3 *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, _____ U.S. _____, 111 S.Ct. 922 (1991).

4 *Cooter & Gell v. Hartmarx Corp.*, _____ U.S. _____, 110 S.Ct. 2447 (1990).

amplify the distortion by adding impermissible Appendices, which are not part of the record.[5]

The relevant orders of the district court were issued on January 26, 1990. Pet. App. 21a. On February 5, 1990, *after* his fourth recusal motion was denied and sanctioned, petitioner sought permission to add material from other cases that allegedly supported his fourth recusal motion. It is obviously significant that petitioner sought to expand the record *after* the district court had reached its decision. It is this omitted fact that completely destroys petitioner's argument about error in rulings regarding the record.

Moreover, petitioner filed his fourth motion for recusal in September of 1989. Before making that motion, petitioner had been expressly warned by the district court that he must take care in preparing the materials he would offer in support of the motion:

> If the application [sic] desires to have [matter from other cases] made part of the record in this case, that should be done specifically so that the specific reason for recusal may be set forth in one file.
>
> The court declines to search the record in the *Person* and *Markel* cases in order to determine what parts of the proceedings in those cases have application to this.

Pet. App. 27a-28a.

The responsibility for making an adequate record was with petitioner. He can blame no one but himself for his failure to heed basic rules of practice.

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5 Needless to say, Petitioner's Appendices contain only material favorable to his cause. But Petitioner's Binders further reveal that his principal allegation of bias in the *Markel* case was that Judge Curtin might "bend over backwards" in favor of Markel. *But see* Pet. Br., at 4. Petitioner also fails to mention that Ms. Markel is his sister. Of course, the Binders themselves were selectively culled from a larger—and presumably less favorable—universe of material.

IV. Can a lawyer seek disqualification of a judge who is alleged to be biased against the lawyer, where there is no possibility of bias toward a party and where the bias alleged results from an adverse ruling in an unrelated case?

Two lower courts have agreed that Senior Judge Curtin is *not* biased against petitioner, and this Court does not question a factual concurrence between two lower courts. *Texas v. Mead*, 465 U.S. 1041 (1984); *Graver v. Linde*, 336 U.S. 271, 275 (1949).

Judge Curtin said plainly that he sanctioned Petitioner for violating Rule 11, and not because he "consider[ed] Mr. Weiss' conduct a personal affront." Pet. App. 21a. The court of appeals heartily concurred:

> In fact, the record reveals that Judge Curtin treated GBP fairly *and exhibited extraordinary patience toward Weiss.*

Pet. App. 6a (emphasis supplied). Despite petitioner's vilification campaign against Judge Curtin,[6] a highly respected jurist with a life long career of public service, even petitioner does not have the temerity to impugn the integrity of the Second Circuit.

Consequently, the lower courts are in complete agreement on the basic facts—Judge Curtin was not biased against Petitioner. Bias cannot be at issue in this case, for two courts have found that it does not exist.

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6 The Respondent's Appendix gives a flavor of the abuse heaped on Judge Curtin by Mr. Weiss. Res. App. 2a. The contents of this Appendix were not on the record compiled by the District Court, but since Petitioner inserted these contents as part of his brief on appeal to the Second Circuit, he cannot object to being buried in his own muck.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Dated: New York, New York
April 30, 1991

Respectfully submitted,

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APPENDIX

APPENDIX—Inserted by petitioner on his brief to Second Circuit

THE BUFFALO NEWS

LOCAL NEWS

Monday, January 19, 1990

Curtin fines lawyer $16,065 for statements in suit

By DAN HERBECK
News Staff Reporter

A Buffalo attorney was fined $16,065 today by U.S. District Judge John T. Curtin in what is believed to be one of the biggest financial sanctions imposed by a judge against a Western New York lawyer.

Arnold Weiss was scolded for filing "immaterial, speculative and threatening" court statements in a lawsuit that was filed 12 years ago and dismissed in 1988.

"I do not take this action because I consider Mr. Weiss' conduct a personal affront," Curtin wrote in a stern 16-page decision. "Rather, I do so because I have a duty to uphold the dignity of this court, and to . . . make clear that conduct such as that displayed by Mr. Weiss in this case, which serves only to obstruct the just and efficient adjudication of cases, will neither be condoned nor ignored."

Although it could not be determined whether the fine against Weiss was the largest such sanction in local history, today's action is nearly three times as large as the $5,500 fine imposed in State Supreme Court last October against Paul W. Beltz, another Buffalo attorney.

The Beltz fine, which is being appealed, was described by the Erie County Bar Association as the largest in recent memory.

Court officials said Curtin's decision was also unusual because Weiss personally—rather than his client—was directed to pay legal fees to the other party in a lawsuit.

Weiss said today he will appeal Curtin's ruling. He accused Curtin of being "prejudiced and bigoted" against him because Weiss holds different political views than the judge and has battled in court against attorneys who are Curtin's friends.

"What you've got here is a war," Weiss said. "I'm not a liberal, and I don't dance to his tune."

"Curtin is absolutely prejudiced against me. We intend to show absolute prejudice on his part. He fined me once before and then had to reverse himself."

The $16.065 fine was ordered in connection with a 1978 lawsuit filed by Greater Buffalo Press Inc. against the Federal Reserve Bank and Marine Midland Bank.

Greater Buffalo Press, represented by Weiss, accused the Federal Reserve and Marine of breaking U.S. banking codes through the slow processing of checks. Curtin dismissed the $5.2 million suit in March 1988, and his decision was affirmed by a federal appeals court 10 months later.

In the related ruling, Curtin refused Weiss' request to remove himself from a 1989 lawsuit filed by Joseph R. Person against the General Motors Corp. In that case, Person, a black man from Cheektowaga, claims he was laid off from his job at the Saginaw Gear plant in 1987 and not rehired because of his race.

Weiss is defending General Motors in the $11 million suit, which is still pending.

Curtin said Weiss has accused him of showing in the courtroom his dislike for the attorney.

"(Weiss claims) I have given 'physical evidence' of my hostility toward him in conversations I have had with other attorneys and jurists and in my 'obvious and undisguised anger, red-faced grimaces, criticisms, impatience and hostile reaction to deponent during court appearances,' " Curtin wrote.

Curtin denied the accusations.

"Through the years, I have handled many cases in which Mr. Weiss represented various clients," the judge wrote. "A review of the record would indicate that Mr. Weiss was successful in many of the cases urged before me—not because

there was any bias on the part of the court for or against him, but simply because the facts and the law were on his side."

In the Greater Buffalo Press case, Curtin wrote, Weiss had "frequently" been given extensions of time to file court motions and Weiss slowed the progress of the case by filing "unnecessary" and "repetitious" motions.

Weiss claimed Curtin's actions today stemmed from bitterness over another, unrelated case. Weiss said Curtin removed himself from the case of Fannye Markel vs. Scoville Manufacturing Co. after Weiss raised questions about Curtin's friendship with attorney Alvin Glick, who represented Scoville.

Curtin removed himself from the Markel-Scoville case in November 1988 and turned it over to Judge Richard J. Arcara. He also dropped sanctions of $14,368 he had imposed against Weiss in 1987.

Curtin is "absolutely out to get me" because of the allegations he raised about the judge in the Markel-Scoville case, Weiss said.

"We've accused him of wrongdoing and violations of judicial conduct," Weiss said.

The judge today said he would have no comment on the situation beyond what was stated in his written decision.

The fact that he removed himself from the Markel-Scoville case should not be taken as an admission of guilt to any of Weiss' claims, nor is it a mandate to remove himself from any other cases involving Weiss, Curtin wrote.

"My decision to recuse myself from Markel was neither an acknowledgment of the legal sufficiency of counsel's motion in that case nor a suggestion that I would not be able to act without bias or prejudice in future cases involving him," Curtin wrote. "There are circumstances in which a judge may wish to recuse himself, although a legally sufficient affidavit of bias and prejudice could not be presented against him."